Department of Justice

STATEMENT OF
RYAN W. BOUNDS
CHIEF OF STAFF
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE
THE SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
H.R. 435, THE EQUAL ACCESS TO JUSTICE REFORM ACT

MAY 23, 2006

Mr. Chairman, Mr. Ranking Member, and other members of the Subcommittee, thank you for allowing me to testify before you today. My name is Ryan Bounds, and I am the Chief of Staff of the Office of Legal Policy in the Department of Justice. I will be presenting the Department's principal views on H.R. 435, the Equal Access to Justice Reform Act. The bill would radically expand the Government's liability for attorneys' fees under the Equal Access to Justice Act (referred to herein as "EAJA" or "the Act"). Most notably, the bill would require the Government to pay a prevailing party's fees even when the Government's position was "substantially justified" based on the facts and law at issue. The bill would also require the Government to pay a party's attorneys' fees even when that party did not prevail in litigation but merely obtained a settlement or voluntary change in the Government's position. In addition, the bill would make the Government liable for attorneys' fees at market rates well in excess of the current presumptive cap of $125 per hour and would expand the universe of parties to whom the Government could be held liable for attorneys' fees under the Act.

I would like to begin by emphasizing that the Administration and the Department of Justice share the desire of H.R. 435's proponents to reduce the burden that frivolous lawsuits and unjustified litigation impose on small businesses and individuals. Just last year, for instance, the Administration supported and the President signed the Class Action Fairness Act and the

Protection of Lawful Commerce in Arms Act. The Administration has similarly supported enactment of the Medical Liability Reform Act and asbestos litigation reform. The Department appreciates the Subcommittee's ongoing efforts to reform and to improve the civil litigation system and will continue to work with the Subcommittee and the full Committee to enact these important measures and others like them.

Notwithstanding the laudable goals of those who support this bill, the Department of Justice must oppose it. The enactment of H.R. 435 would trigger at least four negative consequences. First, it would impose additional costs on the Government by way of attorneys' fees and litigation expenses. Second, it would induce more private lawsuits against the Government, despite the fact that lawsuits are a notoriously inefficient and costly means of settling disputes. Third, it would deter agencies from applying existing law to novel situations, leaving gaps in the law as technology develops and practices change. Fourth, it would deter agencies from voluntarily settling with a party or changing their position after a lawsuit is filed (even in the face of compelling policy justifications for doing so).

These negative consequences would not be offset by any significant improvements in the way EAJA works. In fact, several of the circumstances that are cited as problems and relied upon as justifications for amending EAJA are inconsistent with the Justice Department's experience with the Act. We believe that, as currently written, EAJA has achieved its intended goal of making the judicial system more accessible to small businesses, non-profit organizations, and individuals of modest means. Contrary to the assertions of some critics, the Act has not led to significant collateral litigation over fees, because the Government must stand on the same justifications for its position that it offered in the primary litigation. The Act also has not precluded lawsuits in markets where fees necessarily exceed the statutory cap of $125 per hour, because courts may—and frequently do—increase that cap to reflect increases in the cost of living and other special factors. Moreover, the Act does not typically allow a defending agency to escape the costs of its unreasonable conduct by defraying fee awards with monies from the Treasury's Judgment Fund. Indeed, the overwhelming majority of fee awards under the Act are paid out of the defending agency's appropriations. The current statute thus permits its intended beneficiaries to recover reasonable attorneys' fees directly from agencies that have acted without substantial justification and thereby deters agencies from acting unreasonably. In short, the Act largely fulfills its purpose.

In this testimony, I would like to canvas the most important changes that H.R. 435 would make to EAJA and explain why the Department expects those changes to be counterproductive.

I. Substantial Justification and Special Circumstances in Which Attorneys' Fee Awards Would Be Unjust

Subparagraphs 4(a)(1) and (a)(2) of the bill would amend the Act to allow prevailing parties to recover attorneys' fees against a Government agency even when the agency's position was substantially justified and when special circumstances otherwise make a fee award unjust. The Department very strongly opposes this aspect of the bill. In effect, it would make an agency

liable for attorneys' fees without regard to how close the case is or how reasonable or well-intentioned the agency's position was.

This change would increase agency litigation costs at a time when agency budgets are becoming ever more tightly constrained. Although the additional costs cannot be estimated with any precision, the experience of the Office of Foreign Litigation ("OFL") may shed light on the bill's likely fiscal impact. OFL handles all foreign cases for the Department, and most foreign jurisdictions make the losing party pay attorneys' fees. From a partial analysis of OFL's records, it appears that fee-shifting increases the Government's costs of paying adverse judgments by approximately 15 to 25 percent in most cases. In some cases, of course, the marginal cost may be much greater. In one recent labor case in Italy, for instance, the payment to the attorney was nearly double the amount of the underlying judgment for the adverse party.

By making fee-shifting automatic, H.R. 435 would require fees to be awarded to a prevailing party even when the Government was obligated to take a position in litigation and there was no controlling law, the law was unclear, or the authorities were divided. In this respect, the bill ignores the reality of Government litigation, which is that the Government must often take positions on new and ambiguous statutes and has to "build" the law by litigating the same issue in several circuits. The Government should not be required to pay attorneys' fees while it is in the process of resolving the scope of new laws or the application of existing laws in new areas. At the margin, such a requirement would simply deter the Government from enforcing the law in novel contexts and testing the scope of new statutes. Indeed, Congress provided for a "substantial justification" and "special circumstances" defenses under EAJA expressly because an automatic fee-shifting rule would have a "chilling effect on proper government enforcement efforts."[1]

To the extent that the automatic fee-shifting rule established by H.R. 435 does not entirely deter the Government from enforcing the law in close cases and novel circumstances, it will induce private litigants to bring more lawsuits against the Government in those contexts. Indeed, that result seems to be the very aim of the provision—to make it less expensive for

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[1] The legislative history of EAJA shows that the substantial justification standard was specifically chosen over a variety of alternatives, including a mandatory award to prevailing parties. A system of mandatory awards was rejected because "it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts." *See* H.R. REP. No. 96-1418 at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4992. With respect to "special circumstances," the legislative history explains that "[t]his 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." H.R. REP. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990; S. REP. No. 96-253, at 7 (1979).

private parties to litigate the propriety of the Government's position whenever they have some prospect of prevailing in court. As a result, this reform may increase the overall burden of litigation rather than reduce it.

In addition to these general considerations, the automatic fee-shifting rule provided for in H.R. 435 is likely to wreak havoc on the conduct of critical enforcement proceedings. Foremost among these are *qui tam* lawsuits to recover for fraud against the Government under the False Claims Act. Given the billions of dollars of taxpayers' monies lost to fraud and the integrity of the federal programs at stake, the Government simply cannot refuse to pursue complicated cases for fear of having to pay EAJA fees in every case it loses. Bringing the Government's resources and expertise to bear on these cases is vital: 95% of *qui tam* recoveries are in cases in which the Government intervenes. Moreover, Congress was so concerned with strengthening fraud enforcement under the False Claims Act that the1986 amendments to the Act specifically provided that a prevailing defendant could recover legal costs from a private whistleblower in a *qui tam* case only if the court found the suit to be "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(3). It makes no sense to extend this level of protection to private whistleblowers while leaving the Government liable for uncapped EAJA fees in every unsuccessful *qui tam* case in which it participates. At least at the margins, this bill will deter the Government from intervening in close *qui tam* cases, even though it is exactly those cases in which the Government's expertise would be most valuable in exposing and recovering for fraud. Worse yet, prevailing defendants in these cases will predictably argue that the Government's having declined to intervene is not enough to protect it from liability for attorneys' fees under EAJA as amended by H.R. 435, because the private whistleblower brought the action in the name of and on behalf of the United States.

Eliminating the substantial justification defense is likely to undermine civil enforcement of immigration laws as well. Without that defense, the Government will face liability for potentially large fee awards in an unprecedented number of immigration cases. In one such case, *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001), a terrorist alien prevailed on a habeas corpus petition after the Government attempted to remove him from the United States. The Government had relied on classified evidence, obtained by the FBI's Joint Terrorism Task Force, that suggested that the alien had been involved in the 1993 bombing of the World Trade Center and had made threats against the Attorney General. The district court not only granted the alien's habeas petition but awarded him attorneys' fees in excess of $110,000 under EAJA. The Third Circuit reversed the award of attorneys' fees, holding that the Government had proceeded with substantial justification, but that outcome would not have been possible if H.R. 435 had been in effect.

Not every immigration case involves fees as high as those at issue in *Kiareldeen* (though fees will rise under H.R. 435), but eliminating the substantial justification defense will nonetheless have dramatic implications for civil immigration enforcement. The Department of Homeland Security's efforts to detain and remove illegal aliens from the United States gave rise to more than 14,000 cases in the last fiscal year as aliens challenged the legal justification for the Department's actions in the federal circuit courts. The volume of such challenges are likely to

increase markedly if current efforts to amend the Immigration and Nationality Act are successful, because aliens and their attorneys will want to test the scope and meaning of the new provisions in the courts. Inevitably, the Government will lose some proportion of those cases even when the Department can point to a substantial—but not ironclad—justification for its position. By making the Government pay substantial attorneys' fees in those circumstances, which are pervasive in the complex, politically sensitive, and constantly changing field of immigration law, H.R. 435 will either discourage attempts at robust enforcement or divert substantial resources from enforcement to paying for aliens' trial lawyers. Neither result is consistent with the aim of combating illegal immigration.

The elimination of the substantial justification defense would also directly affect the strength of the Social Security Trust Funds. Like immigration cases, challenges to Social Security decisions would constitute a significant portion of the litigation affected by H.R. 435. EAJA attorneys' fees in Social Security cases are paid from the Social Security Administration's administrative expense account, and that account, in turn, is proportionately funded by the accounts from which Social Security benefits are paid. Accordingly, the increased availability of attorneys' fee awards in Social Security lawsuits—from awards in *some* successful lawsuits to awards in *all* successful lawsuits—will simply increase the amount of funds that are diverted from the Social Security Trust Funds to lawyers for Social Security claimants.

In addition, the elimination of the substantial justification defense would serve as an incentive for claimants to file suit against the Social Security Commissioner in more marginal cases. Even assuming that the Government would prevail in all of these cases and thus avoid an increase in the numbers of fee awards (which is unrealistic), the increase in the number of lawsuits against the Commissioner would increase the resources devoted to defending against them. For cases challenging the denial of title II benefits, these administrative expenses would come from the Social Security Title II Trust Fund.

Although it may be argued that courts liberally award attorneys' fees against the Social Security Administration even under the current version of the Act, the existence of the substantial justification standard is important for settlement purposes. The existence of the defense increases the risk that prevailing claimants will not receive an award and thus gives them an incentive to settle for discounted fees. Although difficult to estimate exactly, the Social Security Administration believes these negotiated settlements result in significant savings. These savings would be lost if the substantial justification defense were eliminated. A similar effect is predicted to result in the diversion of scarce resources from benefits to administrative expenses and litigation in veterans programs as well.

Eliminating the substantial justification defense will have deleterious consequences in another area of litigation in which Congress should have a particular interest: constitutional challenges to federal statutes. In light of the separation of powers, the Department of Justice must defend the laws that Congress enacts if there is any reasonable basis for doing so. If a statute is ultimately invalidated by the courts, as statutes occasionally are, the repeal of the substantial justification defense under section 4 of the bill may result in the Government's

having to pay attorneys' fees to prevailing parties. Consider *Gonzales v. Free Speech Coalition*, 408 F.3d 613 (9th Cir. 2005). In that case, a trade association of businesses involved in the production and distribution of "adult-oriented material" challenged certain provisions of the Child Pornography Prevention Act of 1996 (CPPA). Ultimately, the Supreme Court held that certain provisions were overbroad and unconstitutional. After the Supreme Court's decision, the Free Speech Coalition filed for attorneys' fees under EAJA. The District Court for the Northern District of California found that the Government was not "substantially justified in defending the CPPA because the "constitutional flaw in the CPPA was recognizable from the start" and awarded the Coalition $143,243 in attorneys' fees. The Ninth Circuit reversed and held that the Government's position was substantially justified and that the Coalition was not entitled to EAJA fees. If that case had been decided under the automatic fee-shifting rule contemplated by H.R. 435, the pornographers' attorneys would have been paid by the Government rather than their clients. As this example demonstrates, the enactment of H.R. 435 will result in Congress's subsidizing challenges to its own statutes.

Finally, deleting the substantial justification defense would constitute a fundamental departure from EAJA's original purpose, the deterrence of unreasonable agency conduct. From its perspective as the Government's litigator, the Department of Justice believes this change is unwarranted and also in conflict with the requirement that fee awards be paid out of agency appropriations. To deter unreasonable agency conduct, the Act already provides that awards under 28 U.S.C. § 2412(d) and 5 U.S.C. § 504(a)(1) and (4) are to be paid from the defending agencies' own funds and not from the Judgment Fund. *See* 28 U.S.C. § 2412(d)(4); 5 U.S.C. §§ 504(a)(4), (d). In the absence of the substantial justification defense, however, EAJA becomes simply an automatic fee-shifting statute for all eligible parties that prevail in their litigation against the Government rather than a deterrent against unreasonable agency actions. Consequently, no useful purpose is served by requiring an agency involved in litigation to pay a resulting fee award out of its own appropriations. If the substantial justification defense is eliminated, we believe that attorneys' fees should be paid from the Judgment Fund, as are the awards under other automatic fee-shifting statutes.

II. Rate Caps

Subsection 4(c) of H.R. 435 would eliminate the$125-per-hour cap on attorneys' fees in both judicial and administrative proceedings. The Department of Justice is unaware of any empirical data indicating that meritorious actions are not pursued because of the cap on hourly rates, and the Department opposes repealing the cap for at least two reasons.

First, eliminating the hourly rate cap to accommodate complex and high-risk litigation would not reflect other factors that affect compensation in civil litigation: the number of hours worked and the client's ability to pay. The Department believes it is rare that private sector lawyers are paid for 100% of the time devoted to a particular case—particularly in large cases. Attorneys and clients negotiate bills down to a reasonable amount that the client is willing or able to pay. Additionally, attorneys make decisions about how much time to devote a particular issue or case based, in part, on what the client will pay. Under subsection 4(c), though, there

would be little incentive to apply these market controls to Government litigation.

Second, EAJA currently permits courts to award attorneys' fees in excess of the rate cap in two situations: First, a court can raise the hourly fee on the basis of the cost of living. Second, the court can raise the cap to accommodate a special factor, such as the limited availability of attorneys in a particular practice area. The Department believes that it is better to leave the amount of the hourly fee within the limited discretion of the court rather than burden the Federal agency with steep "market rates" for hourly fees. The rate cap strikes an appropriate balance between the benefits of allowing the recovery of attorneys' fees against the United States and the risk of runaway attorneys' fees where a litigant chooses to use highly paid and sophisticated attorneys to handle routine litigation against the Government.

In the Government's experience, courts routinely take advantage of EAJA's current discretionary authority to exceed the hourly rate cap. For example, the court held that an hourly rate in excess of $125 per hour was justified based on an increase in the cost of living in *Former Employees of Tyco Electronics Fiber Optics Division v. U.S. Department of Labor*, 350 F. Supp. 2d 1075, 1093 (C.I.T. 2004). Other examples abound. *See, e.g.*, *Dewalt v. Sullivan*, 963 F.2d 27 (3d Cir. 1992); *Masters v. Nelson*, 105 F.3d 708 (D.C. Cir. 1997); *Kerin v. U.S.P.S.*, 218 F.3d 185 (2d Cir. 2000); *Greenidge v. Barnhart*, 2005 WL 357318 (N.D.N.Y. 2005).

III. Payment from Agency Appropriations

Subparagraphs 4(f)(1) and (f)(2) would prohibit the payment of EAJA funds and expenses out of the "claims and judgments account of the Treasury from funds appropriated pursuant to section 1304 of title 31." This prohibition would apply both to adversary adjudications at the administrative level and to judicial proceedings. I should emphasize that, under current law, EAJA awards are paid from funds appropriated to the non-prevailing agency. Having said this, routinely awarding legal fees from a non-prevailing agency's budget can create perverse incentives for agencies to take the position least likely to result in litigation rather than the position best designed to implement public policy and the underlying statutory scheme.

Even assuming that the number of EAJA applications remained constant, the lack of a substantial justification defense will result in fees' being awarded in a greater proportion of cases, and the lack of a rate cap will substantially increase the amount of awards when they are made. The resulting increase in liability for fees could have an enormous financial impact on already overburdened agencies. If these changes—which the Department of Justice believes are unwarranted—are imposed, then the awards should be paid from the Judgment Fund.

Additionally, as the Department has noted, under current law, both fees and expenses awarded under 28 U.S.C. § 2412(d) and "bad faith" fees awarded under 28 U.S.C. § 2412(b) are paid out of the agency's funds. In the Department's view, if either the substantial justification or the fee cap were eliminated, then the award should be paid out of the Judgment Fund. This additional change would create symmetry between subsections 2412(b) and (d) because, currently, fee awards under subsection 2412(b) (other than "bad faith" awards) are paid out of

the Judgment Fund. *See* 28 U.S.C. §§ 2412(c)(2), 2414. In addition, fees awarded against the Government under a host of other fee-shifting statutes (including the fee-shifting provision of the Clean Air Act) have historically been paid from the Judgment Fund.

IV. Tax Litigation

Subsection 4(g) of the bill would eliminate the provisions of EAJA stating that EAJA fees and expenses do not apply in cases where 26 U.S.C. § 7430 (an Internal Revenue Code fee provision) applies. *See* 5 U.S.C. § 504(f) and 28 U.S.C. § 2412(e). By its terms, EAJA applies "[e]xcept as otherwise specifically provided by statute." 28 U.S.C. § 2412(d)(1)(A). Elimination of subsection 2412(e) would not change the fact that 26 U.S.C. § 7430 is a Federal statute providing for the award of fees, expenses, and costs in tax cases and that section7430, rather than the EAJA, would continue to apply to tax proceedings. At a minimum, the elimination of this language calls into question whether section 7430 would remain the exclusive remedy for seeking fees and costs in tax proceedings, or whether a taxpayer would be permitted to pick and choose between the two statutes. Accordingly, the Department opposes the amendment to this provision.

Section 7430 was enacted to recognize that differences between tax proceedings and other civil actions to which the United States is a party justify different provisions for recovering litigation costs. For example, section 7430 sets out specific provisions for obtaining administrative costs that are beneficial to taxpayers and that do not appear in EAJA. Further, in recognition of the importance of the administrative process in resolving tax controversies, section 7430 includes a unique requirement that taxpayers exhaust administrative remedies in order to be eligible for an award. As explained in the legislative history of section 7430, the requirement to exhaust administrative remedies preserves "the role that the administrative appeals process plays in the resolution of tax disputes." H.R. Rep. No. 97-404, 97th Cong., 1st Sess. 13 (1981). In addition, there is a question as to whether EAJA even covers proceedings in the Tax Court. Thus, to the extent the proposed legislation purports to allow for the substitution of EAJA provisions in tax litigation, the proposed provisions may not be effective for Tax Court proceedings. In any event, the Department believes section 7430 should remain the exclusive remedy with respect to claims for costs in tax cases and that EAJA should retain the clarifying language in section 2412(e) to this effect.

V. Definition of Prevailing Party

Among other things, section 5 would overturn *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), by amending the definition of "prevailing party" found in 5 U.S.C. § 504(b)(1) and 28 U.S.C. § 2412(d)(2)(H) to recognize the "catalyst theory" as a basis for achieving prevailing party status. In *Buckhannon*, the Court rejected the catalyst theory (which the majority of circuits had endorsed) and held that a party can obtain prevailing party status only by obtaining a favorable judgment or relief through a consent decree or court-approved settlement. Under *Buckhannon*, a plaintiff who obtained relief only because the defendant voluntarily provided the relief that the plaintiff sought

was *not* a prevailing party.

The catalyst theory had held sway for the previous 15 to 20 years because it had been embraced by almost all of the federal courts of appeals. The Supreme Court's rejection of the theory has reduced the Government's exposure to fee liability in a significant category of cases, however, and has spared the Government from litigating whether governmental actions outside of litigation but resulting in some relief to a particular plaintiff had been caused by that party's lawsuit. The legislative overruling of *Buckhannon* will restore those costs to Government litigation. Moreover, it will encourage attorneys to file claims that they normally would decline, because those attorneys will believe that the Government will pay something if they can prevail, settle, *or* achieve any change in the Government's conduct that allows them to claim catalyst status. It also would deter agencies from making voluntary changes that happen to benefit the claimant.

In addition to reducing the parties' incentives to settle court litigation, the combination of the elimination of the substantial justification defense with the enactment of the catalyst theory may negatively affect settlement of contract disputes or taxpayer litigation at the agency level. If any change in policy that is made after a lawsuit is filed can be a basis for attorneys' fees, and there is no substantial justification defense, the incentive will be for contractors to avoid incurring fees and expenses in attempting to negotiate a resolution of a dispute with an agency prior to filing the lawsuit. Instead, the Department of Justice anticipates that many plaintiffs will simply file their lawsuits without delay so that they immediately accrue attorneys' fees that they may eventually recover.

In some circumstances, elimination of the catalyst theory will actually encourage and fund activists who seek to compel the Government to bring additional enforcement actions against individuals and small businesses. For instance, in *Conservation Counsel for Hawaii v. Norton*, a plaintiff brought suit in federal district court against the U.S. Fish and Wildlife Service, alleging that the Service's failure to take final action on a petition for the designation of critical habitat of seventeen species of Hawaiian forest birds constituted action "unlawfully withheld and unreasonably delayed" under the Administrative Procedure Act. Under a joint stipulation of dismissal filed with the Court, the parties agreed in 2001 to dismiss the case as moot without prejudice to Plaintiff's ability to seek attorneys' fees. Shortly thereafter, however, and before fees were agreed to, the *Buckhannon* decision was issued and the plaintiff withdrew its fee request. If the pre-*Buckhannon* approach of many appellate courts were statutorily reinstated, similar future plaintiffs would be able to recover attorneys' fees for suits seeking to prompt Government enforcement actions that might otherwise not be brought. Such a result would only add to the litigation and regulatory burden borne by small businesses.

A specific example of the application of the catalyst theory serves to demonstrate its adverse effects. The case of *Yacyshyn v. Principi*, No. 04-CV-2091 (N.D. Ohio), arose from an initial effort by the Department of Veterans Affairs to report a doctor to the National Practitioner Data Bank, which consolidates reports on doctors who lose or settle medical malpractice cases or are subjected to discipline by State licensing boards. The District Court denied the Department's

motion to dismiss a lawsuit filed by the doctor and ordered discovery. In the meantime, the Department completed its review of the doctor's conduct and decided not to make the report, thereby mooting the case. The doctor was represented by a large law firm, and under H.R. 435, the EAJA award would have been well over $100,000. After objecting to dismissal unless attorneys' fees were paid, however, the doctor's counsel reviewed *Buckhannon* and willingly abandoned the attempt to obtain fees. Under H.R. 435, the doctor would have recovered attorneys' fees for government action that was not driven by litigation, making his unnecessary lawsuit free to him but expensive to the United States.

VI. Conclusion

H.R. 435 would increase the risks of litigation for the Government, chill legitimate enforcement activities, prolong lawsuits, induce additional lawsuits, and impose huge costs on agency budgets. The Department of Justice strongly opposes this legislation.

Thank you for the opportunity to present the Department's views. I am now ready to answer any questions you may have.